No. 89-1144

FILED
FEB 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

ERNEST E. SARGENT and CYNTHIA SARGENT,
Petitioners,

v.

PAINEWEBBER INCORPORATED and KEVIN GREENAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS PAINEWEBBER INCORPORATED AND KEVIN GREENAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court grant the petition for a writ of certiorari to review an arbitration award (A) when petitioners have alleged at most a procedural, not substantive, error by the New York Stock Exchange panel with respect to a New York Stock Exchange procedural rule; (B) where the New York Stock Exchange arbitration rules provide that the arbitrators are empowered to interpret and determine the applicability of the rules; (C) where petitioners failed to bring to the attention of the arbitrators at any time petitioners' complaint regarding the application of the rule; (D) where petitioners fail to show that the rule was not applied correctly; and (E) where petitioners fail to demonstrate any prejudice.

2. Should this Court grant the petition for a writ of certiorari to review, vacate and remand to the arbitrators a clear, unconditional, lump-sum arbitration award when petitioners have demonstrated no grounds for vacation or reversal under the Federal Arbitration Act, 9 U.S.C. § 10.

3. Should this Court grant the petition for a writ of certiorari to review an arbitration award (A) where there is no conflict between or among the Circuit Courts of Appeals; and (B) when to do so would upset the long-standing federal policy favoring arbitration and the principles of speed and thrift sought to be obtained by that federal policy.

LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES

Respondent PaineWebber Incorporated is a wholly owned subsidiary of Paine Webber Group Inc., a publicly held corporation the stock of which is listed on the New York Stock Exchange. Paine Webber Group Inc., through PaineWebber Incorporated and other wholly owned subsidiaries, owns 100% of the outstanding voting stock of over 200 entities that carry on business on behalf of Paine Webber Group Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Sargent v. Paine Webber, Jackson & Curtis, Inc.* is reported at 882 F.2d 529 (D.C. Cir. 1989) and is reprinted at pp. 1a-20a of the Appendix to the Petition for a Writ of Certiorari. The two opinions of the United States District Court for the District of Columbia, granting petitioners' motion to vacate the arbitration award and denying respondents' motion for reconsideration, are, respectively, reported at 674 F. Supp. 920 (D.D.C. 1987) and 687 F. Supp.

7 (D.D.C. 1988) and reprinted at pp. 40a-52a and pp. 21a-39a of the Appendix.

JURISDICTION

Petitioners invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves subsection (d) of section 10 of the Federal Arbitration Act, 9 U.S.C. § 10. Section 10 in full is as follows:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari is the latest, and properly the final, stage of petitioners' five-plus-year effort to litigate with respondents over the alleged negligent mismanagement of petitioners' brokerage account by Paine Webber, Jackson & Curtis, Inc., now doing business as PaineWebber Incorporated, and certain of its personnel.

Petitioners obtained a $46,000 award in arbitration on August 19, 1986. By certiorari, petitioners would have this Court further extend their long-running effort by vacating the award, remanding it to the arbitrators and ordering the panel of arbitrators, appointed by the New York Stock Exchange ("NYSE") pursuant to the agreement between petitioners and respondents to arbitrate their disputes, to file with the District Court a memorandum providing "a full explanation of the manner in which damages were computed," in the absence of any facts suggesting that the arbitrators indulged in any disregard of the law, in the absence of any grounds making it appear probable that the arbitrators committed error and in the absence of any reason to believe that petitioners were denied a full opportunity to present their claim, were denied full and *bona fide* consideration by the arbitrators or otherwise were, in any way, harmed by the arbitration process.

Nothing in the law of arbitration, and nothing in the record, justifies this action.

FACTS AND PROCEEDINGS

On September 18, 1984, petitioners Ernest E. Sargent and Cynthia L. Sargent (together, "Sargent" or "petitioners") filed in the District Court a "Complaint for Negligent Management of Investment Account and Breach of Fiduciary Duty" against Paine Webber, Jackson & Curtis, Inc. and certain of its employees (together, "PaineWebber" or "respondents").

PaineWebber moved to stay proceedings on the complaint in the District Court pending arbitration pursuant to the arbitration clause of the customer agreement between PaineWebber and Sargent. In response, Sargent elected to proceed to arbitration and did not oppose PaineWebber's motion. Sargent then filed a virtually identical complaint (the "Complaint," appended to this brief at pp. 1a-8a) before the NYSE.

According to the Complaint, Sargent transferred existing brokerage accounts to PaineWebber in August 1983. Prior to switching his accounts to PaineWebber, Sargent had maintained, and had purchased securities in, accounts at two brokerage firms, Merrill Lynch and Anderson & Strudwick. The transferred accounts included common stock and also riskier put and call options of Coleco Industries. Complaint ¶ 13.

As testimony in the arbitration proceeding also made clear, Coleco securities were a particularly risky investment, a fact which was known to Sargent. The market value of the securities in Sargent's accounts had decreased during the period that Sargent had been trading through the two antecedent brokerage firms and continued to decrease after the transfer to PaineWebber. *Id.*

To avoid further financial loss, Ernest Sargent, an accountant, "decided on a cost averaging plan" based on his own knowledge of the market, involving hedging his existing portfolio of Coleco securities through additional purchases of Coleco stock in a declining market. *Id.* Sargent informed PaineWebber of the manner in which he intended to trade his securities and thereafter "instructed" and "directed" various PaineWebber personnel to make purchases in the market in furtherance of his cost averaging plan. *Id.* ¶¶ 15-17, 20, 23. Sargent's cost averaging plan, entailing continuous, additional, speculative purchases of Coleco securities over a five-month period, failed.

In the Complaint, Sargent did not complain that PaineWebber had been responsible for counseling or directing Sargent's transactions in Coleco securities pursuant to his risky, self-devised and self-directed "cost averaging plan." Rather, Sargent's claim was based on PaineWebber's alleged failure to effect certain buys and sells in furtherance of the plan, as conceived and directed by Sargent. *Id.* ¶¶ 17, 20 and 23. Sargent sought compensatory damages of $256,000, punitive damages of $500,000 and other, incidental relief.

PaineWebber answered, denying Sargent's allegations of wrongdoing and raising eight affirmative defenses. Particularly, PaineWebber alleged that Sargent was an experienced and sophisticated investor; that Sargent's own conduct had caused or contributed to the claimed losses; that Sargent had full knowledge of the transactions and with that knowledge had allowed matters to proceed; that Sargent had authorized and/or ratified the transactions in his account; that the demand for punitive damages was improper as a matter of law; and that the Complaint failed to state a claim on which punitive damages could be awarded.

With the assistance of counsel, Sargent aggressively and fully prosecuted his claim in arbitration. The hearing covered three days. Sargent was given the opportunity to present his case fully through both documentary and testimonial evidence, including expert testimony. At the time, Sargent made no claim of unfairness, impropriety or error in the conduct of the arbitration hearings. Particularly, Sargent never objected to being heard before three (versus five) arbitrators and otherwise never made either the arbitrators or PaineWebber aware of any discontent with the number or composition of the panel. Such is implicitly conceded in the Petition, at 16-17.

Although (1) Sargent had brought to PaineWebber existing

accounts of securities, including risky put and call options in speculative securities; (2) Sargent had "directed" his own cost averaging plan with respect to his account, including direction of the purchases of thousands of dollars of Coleco securities in an uncertain and declining market; (3) Sargent did not complain initially of any PaineWebber culpability in making these purchases; and (4) over the five-month period in question, Sargent had received full and timely notice of the transactions, yet continued his cost averaging program without surcease, on August 19, 1986 the arbitrators awarded Sargent a total lump sum of $46,000, $43,000 against the firm PaineWebber and $3,000 against broker Kevin Greenan individually.

Pursuant to the NYSE rules and long-standing, accepted arbitration practice, the arbitrators were under no obligation to explain the basis for the determination that Sargent was entitled to an award of $46,000.[1] Nor did any party request of the arbitrators that they provide an explanation of their decision. Furthermore, because neither Sargent nor PaineWebber had requested that a verbatim record be kept, none was.

Consequently, the August 19, 1986 majority arbitration decision[2] stated as follows:

> [I]n full and final settlement of the above-referenced matter, respondent Painewebber shall pay to the claimants the sum of $43,000.00 and respondent Kevin Greenan shall pay claimants the sum of $3,000.00, and further, upon claimants request and with the consent of respondents the claims of the

[1] *See Wilko v. Swan*, 346 U.S. 427, 436 (1953), and its progeny, including the instant case.

[2] Two arbitrators signed the award. The third arbitrator dissented, favoring no award at all.

> claimants against respondents Bruce Edgington, C. Jordan Ball and Joan Doyle are in all respects dismissed.

Sargent was dissatisfied with this award. He moved to vacate in the District Court in a document entitled "Motion to Vacate Arbitration Award and for Reconsideration of Damages and Complaint for Punitive Damages." Sargent's Motion indicated quite clearly that the primary basis was his perception that the one white member of the three-person arbitration panel (who had dissented from the award) was so biased against Sargent, a black, that the white arbitrator successfully had influenced the two black members of the arbitration panel to award Sargent far less than the amount to which he was entitled: "[The white panel member] apparently intimidated the two black non-member [*i.e.*, not associated with the securities industry] arbitrators and adversely affected the outcome of the decision." According to Sargent, he had the right to demand of the New York Stock Exchange a panel of arbitrators consisting of a black, a Jew and a female (Sargent's ideal panel comprised three, not five, arbitrators), and because he did not receive a panel of precisely that composition, the panel he did receive was biased against him. PaineWebber opposed Sargent's motion and cross-moved for confirmation of the award.

On December 8, 1987, in a Memorandum Order, the District Court vacated the arbitration award, despite finding that the panel was not biased against Sargent. The basis of the District Court decision was the failure of the NYSE panel to set forth an explanation for its $46,000 award. Despite the rule, recognized by the District Court, that the NYSE arbitration panel was under no obligation to explain its decision, the District Court concluded that the award was "ambiguous" and "illusory" without an explanation of how the arbitrators had arrived at $46,000 and that it was impossible to determine

whether the Court should enforce the award without an explanation of how it had been reached. Therefore, the Court vacated the award, remanded the dispute back to the arbitrators and ordered the arbitrators to file a memorandum with the Court providing a "full explanation of the manner in which damages were computed . . . ." The Court gave the arbitration panel forty-five days in which to complete this task. *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 674 F. Supp. 920, 923 (D.D.C. 1987).

PaineWebber moved for reconsideration of the District Court's decision. Meanwhile, the forty-five day period passed without appearance or responsive action by the NYSE or the arbitrators. On May 10, 1988, in a second Memorandum Order, the District Court denied PaineWebber's motion for reconsideration and reiterated its order of vacatur and remand and that the NYSE arbitration panel file with the District Court, this time by July 1, 1988, a full explanation of the manner in which damages were computed. *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 687 F. Supp. 7, 11 (D.D.C. 1988). Once again, neither the NYSE nor the arbitrators took responsive action.

PaineWebber appealed. The Court of Appeals unanimously reversed, ordering that the District Court grant PaineWebber's motion to confirm the award. *Sargent v. PaineWebber, Jackson & Curtis, Inc.*, 882 F.2d 529, 533 (D.C. Cir. 1989). On the principal points, the Court of Appeals held:

1. A lump-sum arbitration award cannot be rejected for want of an explanation or remanded for an explanation in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award, citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972), *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985),

and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). 882 F.2d at 532.

2. There was nothing to suggest that the arbitrators had indulged in any disregard of the law. *Id.*

3. The record provided a basis for the arbitrators' award, from which "it seem[ed] likely that . . . the arbitrators apportioned blame to both sides and calculated the award accordingly." *Id.*

4. Sargent's suggestion that the arbitrators had not properly resolved the punitive damages issue was "utterly fanciful." *Id.* at 533.

Sargent's petition for reconsideration and rehearing *en banc* was denied, and the instant petition for a writ of certiorari followed.

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

1. The Petition Should Be Denied Because (A) Petitioners Have Alleged At Most A Procedural, Not Substantive, Error By The NYSE Arbitration Panel With Respect To An NYSE Rule; (B) The NYSE Rules Provide That The Arbitrators Are To Interpret And Apply The Rules; (C) Petitioners Did Not Raise Their Procedural Objection And Claim Of Rule Violation With The Arbitrators; (D) Petitioners Have Failed To Show That The Rule Was Not Applied Correctly; and (E) Petitioners Have Failed To Show Any Harm.

A. Petitioners Complain Of A Procedural Violation Only Under NYSE Rules.

Petitioners' main complaint is that under NYSE Rule 607 (the cited NYSE rules are appended to this brief at pp. 9a-10a), they were entitled to a panel of five arbitrators, not the three to whom petitioners presented their case. *See* Petition at 1, Question 1, 16-17, 39-41. The argument is that Rule 607 provides for five arbitrators in controversies of $500,000 or more unless the parties agree otherwise, and that while petitioners' total losses and compensatory damages claim were under $300,000, their $500,000 punitive damages claim made this an $800,000 controversy and thus caused the five-arbitrator provision to be invoked.

Even were petitioners correct, and they are not, they have not stated grounds for this Court to grant the requested petition. Petitioners do not claim that there was any substantive error or misapplication of law. They do not argue that the arbitrators misperceived or misapplied the law of negligence,

breach of fiduciary duty or breach of contract, or even of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, which was not an express basis for the Complaint. Rather, petitioners argue only that there was procedural error, that under NYSE Rule 607 the case should have been heard by two more persons. It is, however, axiomatic that this Court, and indeed the lower federal courts as well, will not sit in judgment over these procedural issues. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964):

> Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

See also Wilko v. Swan, supra at 436 (footnote omitted):

> As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" . . . cannot be examined.

Effectively, petitioners would have this Court vastly expand the federal courts' limited power to vacate arbitration awards. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, ____, 107 S. Ct. 2332, 2340 (1987). Petitioners want the Court of Appeals' decision reversed, and the District Court's vacatur and remand reinstated, on the basis of an alleged deviation from NYSE Rule 607. In other words, petitioners seek adoption of the principle that federal courts must examine arbitrators' and arbitral forums' procedural determinations and must vacate awards, and remand for explanation, whenever federal courts are uncertain about the interpretation and application of the forum's procedural rules.

This is directly contrary to the well established limitations on federal court review powers set down by statute in the Federal Arbitration Act and by case law in such cases as *Wilko* and *McMahon*. There is no warrant in this case to grant certiorari to overthrow these established limitations.

Even were this Court to open its doors to review of such procedural uncertainties, thereby converting those doors to floodgates, this Court should not do so where, as here, review necessarily involves consideration of the merits. Federal courts simply should not, and will not, delve into the merits of an arbitration. *John Wiley & Sons, Inc. v. Livingston, supra* at 557. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960): "The Courts . . . have no business weighing the merits . . . ."; *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960): "It is the arbitrator's construction which was bargained for . . . the courts have no business overruling him because their interpretation . . . is different from his."

In order to determine whether or not the procedure employed in petitioners' arbitration conformed to NYSE Rule 607, the reviewing court will have to explore and assay the deliberations and conclusions of the NYSE arbitration department and arbitrators regarding whether petitioners met the "matter in controversy" or "amount in controversy" tests of Rule 607. This review will require judicial consideration of both the merits of petitioners' compensatory and punitive damages claims and the application of the NYSE's standards regarding the value of the matter in controversy to those claims, in order to determine the correctness of the NYSE's decision on the number of arbitrators. *Cf.* 14A C. Wright, A. Miller & E.Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3702 at 23-25.

The NYSE must be accorded wide discretion in deter-

mining whether petitioners' punitive damages claim was to be included in the matter in controversy and whether the claim, if it were to be included, was sufficient to meet the five-arbitrator threshhold. Such discretion includes the right to exclude punitive damages altogether from the value of the matter in controversy. *See id.* at nn. 21 and 63.

Certiorari is particularly inadvisable in this case simply to inquire into NYSE procedural standards and discretionary determinations regarding their applicability. *See Shearson/American Express, Inc. v. McMahon, supra* at ____, 107 S. Ct. at 2340, citing *Wilko v. Swan, supra* at 436-37:

> Finally, *Wilko* noted that the "[p]ower to vacate an award is limited," and that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."

Finally, and most fundamentally, this Court should not open up judicial review of the NYSE's decision on the number of arbitrators because that decision has nothing to do with arbitrability of this matter or the NYSE's power to arbitrate this matter. These issues were determined previously by petitioners and respondents in their written agreement to arbitrate all disputes, subject to petitioners' choice of forum (petitioners chose the NYSE). That is, the source — the sole source — of the arbitrators' jurisdiction or power is the parties' agreement to arbitrate and their presentation to the arbitrators. *See, e.g., United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 598; *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965).

So much is evident from Rule 607. The Rule itself is titled "Designation of Number of Arbitrators" and clearly sets out only the number of arbitrators, not the basic question of power to arbitrate. Moreover, the Rule expressly contemplates

agreements by the parties to limit the number of arbitrators, indicating that the parties' agreement, not the Rule, is the genesis of the forum's jurisdiction. *See United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 599.

B. The NYSE Rules, By Which Petitioners Agreed To Be Bound, Lodged Sole Authority For the Interpretation And Application Of NYSE Rules In The Arbitrators.

Petitioners agreed to proceed under the NYSE Rules and to be bound by the arbitrators' decisions on and under the Rules. *See United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 599. NYSE Arbitration Rule 622 expressly provides:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

Petitioners in effect now want this Court to abrogate their agreement or, alternatively, to vitiate this Rule so as not to be bound by it. Neither this subject matter nor the relief sought is appropriate for certiorari.

C. Petitioners Did Not Raise Their Procedural Objection And Claim Of Rule Violation With The Arbitrators.

Even were petitioners persuasive that as a matter of principle, the restrictions on judicial review of arbitration awards should be forsaken to allow vacatur and remand because of an alleged error in the number of arbitrators, petitioners cannot succeed because they never brought their objection to the

attention of the arbitrators (or of PaineWebber). By proceeding before the three arbitrators, and submitting their claim for decision to the three arbitrators, without objecting to or otherwise informing the panel of the objection to its composition, petitioners waived their right to challenge the number of arbitrators in court. On this, the federal courts are uniform. *See, e.g., Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267-69 (7th Cir. 1988); *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140-41 (7th Cir. 1985), *aff'd*, 802 F.2d 926, *cert. denied*, 480 U.S. 907 (1987); *Ficek v. Southern Pacific Co., supra* at 657. For a case on point on closely analogous facts, *see Peters Fabrics, Inc. v. Jantzen, Inc.*, 582 F. Supp. 1287, 1291-92 (S.D.N.Y. 1984). Accordingly, there is no reason for this Court to grant certiorari.

D. Petitioners Fail To Show That NYSE Rule 607 Was Not Applied Correctly.

Petitioners simply assume that because (1) their Complaint sought a total of $756,000 in compensatory and punitive damages and (2) NYSE Rule 607 provides for three arbitrators where the "matter in controversy" is less than $500,000 but for five arbitrators where the "amount in controversy" is $500,000 or greater, petitioners were absolutely entitled to five arbitrators under Rule 607. That is not necessarily the case. NYSE Arbitration Rules do not state that punitive damages claims (or claims for treble damages, interest, attorneys fees, costs or other similar relief) are, or must be, included in valuing the "matter in controversy" or "amount in controversy" for purposes of Rule 607.[3] NYSE arbitration officials

[3]The use first, in Rule 607(a), of "matter in controversy," rather than "amount in controversy," as the operative criterion indicates that petitioners' simple equation that total damages sought equals the determinative figure under Rule 607 is incorrect. Rather, consistent with the underlying notion of arbitration, the arbitrators are to bring and apply their ex-

and/or the arbitrators readily could have found that the value of the matter in controversy was the compensatory damages claim, without the punitive damages amount included. Indeed, that determination would have been facially correct, as the Complaint was for negligence, breach of fiduciary duty and breach of contract, theories of relief which in and of themselves do not permit recovery of punitive damages. Mere invocation of the magic words for punitive damages is not a token guaranteeing that amount in controversy requirements have been met, even under the liberal pleading standards of the Federal Rules of Civil Procedure. *See Kahal v. J.W. Wilson & Assoc., Inc.*, 673 F.2d 547 (D.C. Cir. 1982).

Because it is possible, even likely, that NYSE arbitration personnel and/or the arbitrators applied Rule 607 correctly, federal courts cannot second guess or disturb the arbitration. *See, e.g., French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 908 (9th Cir. 1986), citing, *inter alia, Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra* at 24-25; *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 893, 894 (2d Cir. 1985). This refusal to intervene is especially appropriate where petitioners have shown nothing harmful, or even untoward, in the application of the Rule or in the arbitrators' actions.

Even were such a plausible, and likely correct, application of Rule 607 not discernible from the record, and even were the misinterpretation of Rule 607 evident from the record, that would not permit a federal court to disturb the award. Errors in the interpretation or application of law by arbitrators, "in contrast to manifest disregard" of the law, "are not subject,

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perience, expertise and judgment, when asked, to the issue of the value of the matter in controversy. *See generally United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 597; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173-74 (2d Cir. 1984).

in the federal courts, to judicial review . . . ." *Wilko v. Swan, supra* at 436-37. *See French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* at 906 (citations omitted):

> "The rule is, though the 'arbitrators' view of the law might be open to serious question, . . . [an award] which is within the terms of the submission, will not be set aside by a court for error either in law or fact' . . . ."

"Manifest disregard" of the law exists only where the arbitrators plainly understand and correctly state the law, but proceed to ignore it nonetheless. *Siegel v. Titan Indus. Corp., supra* at 893; *Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co.*, 516 F. Supp. 1305, 1315 (D.D.C. 1981). Petitioners do not make any showing whatsoever that the arbitrators were consciously aware of a principle of law but disregarded it nevertheless. As is evident from the two District Court opinions below, and as the Court of Appeals expressly found, petitioners have never made a showing of manifest disregard of the law, *i.e.*, have never presented the key to unlock the door of substantive federal court review, let alone to invite the extreme remedy of vacatur and remand. *Sargent v. Paine Webber, Jackson & Curtis, Inc., supra*, 882 F.2d at 532.

Moreover, this Court has made it clear that the attention of the federal courts in this respect is to be focused on "substantive rights." *Shearson/American Express, Inc. v. McMahon, supra* at ____, 107 S. Ct. at 2340, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 633-34 (1985). Petitioners point to no trenching of any substantive right, whether or not the result of "manifest disregard" of the law. Nor is there any to be found in this case.

E. Petitioners Fail To Show Any Harm Resulting From Any Alleged Incorrect Interpretation Or Application Of Rule 607.

Petitioners do not show any harm, prejudice or unfairness which resulted from the alleged erroneous interpretation or application of NYSE Rule 607. Before the judicial intervention into the arbitration process sought by the Petition is justified, petitioners must show harm or unfairness. *See, e.g., Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., supra* at 1314 (citations omitted):

> The error which would constitute misconduct so as to justify vacating an award must not simply be an error of law, but one which so affects the rights of a party that it may be said to deprive him of a fair hearing.

The logic of requiring that palpable, substantial harm or unfairness result before a court will vacate an arbitration award has been a constant theme of this Court from at least *Wilko v. Swan* in 1953 through *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). *See Shearson/American Express, Inc. v. McMahon, supra* at ____, 107 S. Ct. at 2340.

Arbitration is intended to relax the procedures, limitations and expenses of court actions. Arbitrators are intended to have wide discretion in conducting hearings, and the resulting awards are immune from judicial review even if the product of erroneous interpretations of law or erroneous determinations of fact. Thus, error alone will not cause an award to be disturbed and should not give rise to certiorari. Here error alone is all, at most, that petitioners argue. The Court of Appeals below was wholly correct and in line with the decisions of this Court, and of every other court, when it ruled:

> We reject the idea that a lump-sum award can be rejected . . . in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award.

Sargent v. Paine Webber, Jackson & Curtis, Inc., supra, 882 F.2d at 532.

2. The Petition Should Be Denied Because The Lump-Sum Award Was Clear, Unconditional And Unambiguous And Was Based On Grounds Inferrable From The Record.

A. The Award Was Clear And Unambiguous.

Never in the reported history of federal court review of arbitration awards has a lump-sum award, such as the one in this case, ultimately been vacated and remanded for an explanation. *See, e.g., Siegel v. Titan Indus. Corp., supra* at 893-95; *Koch Oil, S.A. v. Transocean Gulf Oil Co., supra* at 554; *Kurt Orban Co. v. Angeles Metal Systems,* 573 F.2d 739, 740-41 (2d Cir. 1978); *Sobel v. Hertz, Warner & Co.,* 469 F.2d 1211, 1216 (2d Cir. 1972); *Ballantine Books, Inc. v. Capital Distributing Co.,* 302 F.2d 17, 22 (2d Cir. 1962); *Tinaway v. Merrill Lynch & Co.,* 692 F. Supp. 220, 226 (S.D.N.Y. 1988); *Atlanta-Tomberlin, Inc. v. Eastern Board of Cherokee Indians,* 672 F. Supp. 887, 889 (W.D.N.C. 1987); *Svoboda v. Negey Assoc., Inc.,* 655 F. Supp. 1329, 1333 (S.D.N.Y. 1987); *Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., supra* at 1312-16. Despite the unanimity of the courts refusing to second-guess arbitrators' lump-sum awards, and despite the explicit, definite and unambiguous award of $46,000 "in full and final settlement" of all claims, petitioners attempt to gain certiorari by questioning whether the arbitrators decided petitioners' punitive damages claim.

There is no cause to break from this history in this case. Petitioners were awarded $46,000, $43,000 against Paine Webber, Jackson & Curtis, Inc. and $3,000 against Kevin Greenan, "in full and final settlement" of petitioners' claims. Petitioners submitted their punitive damages claim to the arbitrators voluntarily, openly and without reservation, *see* Complaint ¶ 22 and ad damnum clause ¶ 2, and tried the claim to the arbitrators. Also, the punitive damages claim was clearly within the terms of the submission, under both the arbitration agreement between Sargent and PaineWebber and the Complaint. *See French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra* at 906; *Kurt Orban Co. v. Angeles Metal Systems*, *supra* at 740-41; Point 1.A. above. Thus, there can be no ambiguity as to whether the punitive damages claim was considered and decided. It was.[4]

The $46,000 award itself is not ambiguous. It is a fixed, definite sum. There is no condition or contingency to the award, nor any unexplained or unanticipated condition or contingency arising after or out of the award. There is no uncertainty as to who gets what or as to what the District Court was asked to confirm.

A mere failure to state the means by which the arbitrators arrived at this clear and definite award, or to specify precisely which of various theories or claims were successful and to what extent, is not an ambiguity which requires explanation or permits vacatur and remand. *See Siegel v. Titan Indus. Corp.*, *supra* at 893-94; *Refino v. Feuer Transportation, Inc.*,

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[4]Additionally, the award assessed the costs equally against the parties, indicating the arbitrators' view that both sides bore fault for the claimed loss and that excessive damages were not justified. Also, this even split of costs corroborates the Court of Appeals' view that "it seems likely that . . . the arbitrators apportioned blame to both sides . . . ." *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, *supra*, 882 F.2d at 532.

480 F. Supp. 562, 565-66 n.3 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980) (citing *United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 598). Uniformly, it is well established, following *Wilko v. Swan*, that arbitrators may render lump-sum awards without any explanation at all, and the absence of an explanation does not give cause for suspicion or judicial inquiry. *See, e.g., Koch Oil, S.A. v. Transocean Gulf Oil Co., supra* at 554; *Atlanta-Tomberlin, Inc. v. Eastern Board of Cherokee Indians, supra* at 889; *Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., supra* at 1315-16.

B. A Basis For The Award Is Inferrable From The Record.

Petitioners repeatedly and emphatically argue that this Court should grant certiorari to consider whether to vacate and remand the award because there was "no arbitration record whatsoever" or "no arbitration record of any sort." *E.g.*, Petition at 29, 36. But petitioners are wrong on this point. There is a record. The "record" is not limited to, and does not require, the verbatim reproduction of the testimony and other evidence at the hearing. The "record," as *Sobel v. Hertz, Warner & Co., supra* at 1215, and *Tinaway v. Merrill Lynch & Co., supra* at 225-26, indicate, can be the written submissions of the parties, including the complaint (or, as it is known in arbitration, the statement of the claim). That record exists in this case, and it is from that record that the Court of Appeals found a ready, plausible basis for the award. *Sargent v. Paine Webber, Jackson & Curtis, Inc., supra*, 882 F.2d at 553.

In fact, one need look no further than Sargent's own Complaint to the NYSE to find ample grounds for the award. Sargent maintained that he decided on the "cost averaging plan" to recoup already existing losses, that he informed

PaineWebber of the plan and that he instructed PaineWebber on particular executions within that cost averaging plan. Complaint ¶¶ 12-13. His particular complaint was that on five discrete occasions (mid-September, October 20, November 25 and December 14, 1983 and January 1984), over a five-month period, PaineWebber negligently failed to comply with Sargent's directions. *Id.* ¶¶ 14-18, 20. During these five months, Sargent rode the market, all the while receiving notice of PaineWebber's alleged failures. It is entirely possible, and indeed likely, as the Court of Appeals found, that the arbitrators found shared responsibility and apportioned blame. Furthermore, it is also quite possible, on the basis of Sargent's own pleading, that the arbitrators placed limitations on claimed losses due to ratification or acceptance by Sargent and his continuation of his cost averaging plan.

The record of the case also contains PaineWebber's answer and defenses. It is clear from this pleading that PaineWebber presented defenses of the fault and contributory fault of Sargent and of Sargent's awareness, authorization and ratification of the actions complained of.

From this record the arbitrators may have concluded, permissibly, properly and in accordance with law, that PaineWebber was not entirely responsible for Sargent's claimed losses, that Sargent bore substantial responsibility for the losses or that Sargent's actual losses, regardless of responsibility, were substantially less than the amount claimed. *See Tinaway v. Merrill Lynch & Co., supra* at 225-26.

What petitioners really decry is not the general lack of a record from which a basis for the award may be gleaned, but the absence of a verbatim transcript. That absence, however, is petitioners' fault, as well as a consequence of the speed and thrift of the arbitration process. NYSE Arbitration Rule 624, captioned "Record of Proceedings," provides:

> Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration shall be kept. If a record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.

No formal verbatim record was kept because Sargent did not request one. Having bypassed the right to a verbatim record (and later transcription if desired), it is not now Sargent's prerogative to rely on the absence of a formal, verbatim record as grounds to vacate and remand the award. *See* Point 1.C. above.

3. The Petition Should Be Denied Because (A) There Is No Conflict Between Or Among The Circuit Courts Of Appeals; And (B) Certiorari Would Upset Long-Standing Federal Policy Favoring Arbitration And Contravene The Principles Of Speed And Thrift Underlying That Federal Policy.

A. There Is No Conflict Between or Among The Circuit Courts of Appeals.

Petitioners paint the decision below as conflicting with other federal court decisions:

> The Columbia Circuit is alone, and is in conflict with five other circuits, in holding that a lump-sum award is immune from all judicial remand for explanation of how damages were computed where there is no arbitration record of any sort from which support for or understanding of the award may be gleaned, absent probability of manifest disregard of the law appearing from the (non-existent) record or failure of facts to support it.

Petition at 36. This portrayal of the Court of Appeals' decision is imprecise and inaccurate and in truth, there is no conflict.

The Court of Appeals expressly followed precedent from this Court and from the Court of Appeals for the Second Circuit in reaching its decision. Following *Wilko v. Swan*, the Court of Appeals acknowledged that arbitral awards may be made without explanation. 882 F.2d at 532. Following *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court of Appeals found that the requirement of an explanation for arbitration awards would unjustifiably undermine the speed and thrift manifested by the federal policy favoring arbitration. *Id.* Following *Sobel v. Hertz, Warner & Co.*, *Koch Oil, S.A. v. Transocean Gulf Oil Co.* and *Siegel v. Titan Indus. Corp.*, the Court of Appeals held that lump-sum awards could not be rejected for want of an explanation in the absence of an indication of probable error justifying vacation of the award. *Id.* at 532, 533. Following *Sobel* and *Koch Oil, S.A.*, the Court of Appeals found that a lump-sum award could not be vacated if grounds for it could be gleaned from the record and that the necessary gleaning was normally possible as long as the record disclosed a permissible route to the stated conclusion. *Id.* at 532.

Thusly stating the applicable standards, the Court of Appeals was wholly in line with every other decision on the subject cited by petitioners and of which respondents are aware.[5]

The Court of Appeals then examined the record, particularly Sargent's Complaint before the NYSE, and found a plausible, permissible "route to the stated conclusion," namely that the

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[5]Though unstated in the decision, the Court of Appeals also was in complete harmony with a prior decision of its own, *Hale v. Friedman*, 281 F.2d 635 (D.C. Cir. 1960).

facts indicated the likelihood of shared fault and the award reflected this likelihood. The Court of Appeals also found that there was no ambiguity as to the meaning of the award, with petitioners' suggestion that the panel may not have decided the punitive damages claim "utterly fanciful" in the face of petitioners' own facts as alleged in the Complaint and the plain words of the "full and final" award. *Id.* at 532-33.

In all but three cases cited by petitioners, remand was denied, consistent with the Court of Appeals' decision below. In the remaining three cases, an award was remanded but not for "a full explanation of the manner in which damages were computed," as the District Court here ordered. *Sargent v. Paine Webber, Jackson & Curtis, Inc., supra*, 687 F. Supp. at 11 and 674 F. Supp. at 923. Rather, remands were necessary to clarify or complete the award, so that the District Court could determine what to enforce and how to enforce it.

In *Olympia & York Florida Equity Corp. v. Gould*, 776 F.2d 42 (2d Cir. 1985), the award failed to deal completely with a material contingency to the award, created by the arbitrators. When the contingency failed, the reviewing court could only speculate on what to enforce and how to enforce, and so it sought the arbitrators' assistance on a remand as to what they had intended upon the failure of the material contingency. As the Second Circuit stated, the remand "simply provides an expeditious means for dealing with . . . a *casus omissus* in the Award." *Id.* at 45.

In *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439 (7th Cir.), *cert. denied*, 393 U.S. 925 (1968), the District Court was unable to discern from the award or the record if the arbitrators had considered whether a material payment clause had been subject to arbitration under the arbitration agreement. The District Court asked this question of the arbitrators, who responded that the payment clause had not been within

the purview of the arbitration agreement. With this response, the District Court confirmed the award, leaving the nonarbitrable issue for judicial resolution. This decision was affirmed by the Court of Appeals. 397 F.2d at 441-42, 443.

In *Shearson Loeb Rhoades, Inc. v. Much*, C.A. No. 81-4225 (N.D. Ill. Jan. 3, 1983) (unreported), *appeal dismissed*, 754 F.2d 773 (7th Cir. 1985), the District Court enforced the arbitrator's finding of liability but remanded for a recalculation of damages because the original award was not based on anything in the record but rather on "'sheer speculation.'" 754 F.2d at 775. The Court of Appeals did not reach the merits of the appeal. However, in *Galt* the Seventh Circuit had set out as a general standard for judicial review that questions of arbitrability "will not be disturbed if there is any basis therefor," 397 F.2d at 442 (citations omitted). The District Court's inability in *Much* to find any basis in the record for the damages is consistent with this standard, substantially similar to the standard articulated and applied by the Court of Appeals below.

B. Certiorari Would Upset The Long-Standing Federal Policy Favoring Arbitration And Contravene The Principles Of Speed And Thrift Underlying That Policy.

Federal policy favoring arbitration, and particularly favoring the "simplicity, informality, and expedition of arbitration" over "the procedures and opportunity for review of the courtroom," is thoroughly embedded in this Court's decisions on arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra* at 628. *See Shearson/American Express, Inc. v. McMahon, supra* at____, 107 S. Ct. at 2340, and cases cited therein. Courts of Appeals have expressly recognized

and deferred to that policy in their chary approach to judicial invasion of the arbitrators' domain. *See, e.g., Sobel v. Hertz, Warner & Co., supra* at 1215:

> But there is also a public interest manifested in the United States Arbitration Act, 9 U.S.C. § 1 et seq., in the proper functioning of the arbitral process. It would be destructive of that process if we approved the district judge's requirement here that the arbitrators give reasons for their decision.

The Court of Appeals below, following this Court and the Second Circuit, effected that policy in its decision:

> But the absence of a duty to explain is presumably one of the reasons why arbitration should be faster and cheaper than an ordinary lawsuit. We thus agree with the Second Circuit that an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed.2d 765 (1983).

Sargent v. Paine Webber, Jackson & Curtis, Inc., supra, 882 F.2d at 532.

Granting certiorari to review the arbitration in this case would offend this federal policy. This case presents a commonplace, lump-sum award, based on faultless proceedings and issued in customary form. On its face and in its making, it does not admit of, or even suggest, any error by the arbitrators or disobedience to their duties of full and fair consideration. Petitioners themselves show no error of substance, no error impeaching the fairness of the process, no entrenchment on their rights to present their case or seek recompense. To hold that this award must be reviewed, vacated, remand-

ed and then reviewed again simply because the arbitrators did not explain their reasoning would free no arbitration from this multi-level review, save those awards accompanied by explanations satisfactory to all. Either way, whether explanation is necessitated initially or on remand, and whether new substantive review by the federal courts follows the award directly or indirectly, the purposes of arbitration will be defeated. There will be no more speed, and no more thrift. This would gravely disturb — if not end — the arbitration process. *See Sobel v. Hertz, Warner & Co., supra* at 1215 n.7.

CONCLUSION

For the foregoing reasons, respondents PaineWebber Incorporated and Kevin Greenan respectfully urge this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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DATED: February 22, 1990

BEFORE THE ARBITRATION COMMITTEE OF THE NEW YORK STOCK EXCHANGE CORPORATION

ERNEST E. SARGENT
4711 Sargent Road N.E.
Washington, D.C. 20017

and

CYNTHIA L. SARGENT
140 35th Street N.E.
Washington, D.C. 20019

Claimants

v.

PAINE WEBBER JACKSON & CURTIS INC.
1120 20th Street N.W.
Washington, D.C.

and

KEVIN GREENAN
c/o PAINE WEBBER
1120 20th Street N.W.
Washington, D.C.

and

BRUCE EDGINGTON
c/o Johnston Lemon & Co., Inc.
Atrium Building
Alexandria, Virginia

and

C. JORDAN BALL
c/o PAINE WEBBER
1120 20th Street N.W.
Washington, D.C.

and

JOAN DOYLE
c/o PAINE WEBBER
1120 20th Street N.W.
Washington, D.C.

Respondents

CLAIM FOR NEGLIGENT MANAGEMENT OF INVESTMENT ACCOUNT, BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT

I. **Nature of Claim**

1. This claim is based on the respondents' negligent mismanagement of the claimants' investment account and their failure to execute orders to sell and purchase stock as directed by claimants.

II. **Arbitration**

2. The parties to this claim agreed to Arbitration before the New York Stock Exchange pursuant to written agreements signed by the parties.

III. Parties

3. Claimants, Ernest E. Sargent and Cynthia L. Sargent, are residents of the District of Columbia and were owners of certain securities managed by the respondents in their capacity as stockbroker for claimants.

4. The respondent, Paine Webber Jackson & Curtis Inc., a corporation, (hereinafter "Paine Webber") is a licensed securities broker with offices in New York, and in many states of the United States, as well as in the District of Columbia. Claimants are advised and believe that said respondent is licensed by the District of Columbia to carry on its business therein. At all times pertinent to this action, Paine Webber was so engaged in the business of acting as broker for its customers in the District of Columbia.

5. Respondent, Kevin Greenan, was, at all times pertinent to this action, employed by respondent Paine Webber as an account executive, and acted as agent for respondent Paine Webber at its place of business in the District of Columbia. Defendant Kevin Greenan may hereinafter be referred to as "Greenan."

6. Respondent, Bruce Edgington, was, at all times pertinent to this action, employed by respondent Paine Webber as an account executive, and acted as agent for respondent Paine Webber at its place of business in the District of Columbia. Defendant Bruce Edgington may hereinafter be referred to as "Edgington."

7. Respondent, Jordan Ball, was, at all times pertinent to this action, employed by respondent Paine Webber and acted as agent for respondent Paine Webber at its place of business in the District of Columbia. Defendant Jordan Ball may hereinafter be referred to as "Ball."

8. Respondent, Joan Doyle, was, at all times pertinent to this action, employed by Paine Webber as an account executive, and acted as agent for Paine Webber at its place of business in the District of Columbia. Respondent Joan Doyle may hereinafter be referred to as "Doyle."

IV. Statement of the Claim.

9. The allegations in paragraphs numbered 1-8 are incorporated herein as if they were literally set forth again.

10. In approximately July of 1983, the claimant Ernest E. Sargent (hereinafter "Sargent") transferred his investment accounts to Paine Webber from two other brokerage houses, after Greenan approached him and solicited his business. Sargent's daughter, Cynthia L. Sargent, was also named on the Paine Webber account as joint tenant with right of survivorship. The Sargents' portfolio at this time included approximately 400 shares of stock and approximately eight put and call options thereon in Coleco Industries (hereinafter "Coleco") as well as assorted other investments.

11. At all times pertinent to this claim, the respondents were acting as the claimants' duly appointed agent for the purpose of conducting sales and purchases of corporate stocks and put and call options thereon on behalf of claimants. The respondents owed the claimants the duty to exercise reasonable care, diligence and judgment on the claimants' behalf.

12. The market value of the Coleco securities had decreased since Sargent purchased them. To avoid any financial loss, Sargent decided on a "cost averaging plan" by which he would purchase additional shares of Coleco stock at the decreased market price to reduce his average cost basis in all of his Coleco stock. When the average cost basis of the

Coleco stock was equal or close to the market value, Sargent planned to sell all of that stock thereby eliminating or reducing any financial loss.

13. In approximately September of 1983, Sargent informed Greenan of his cost averaging plan. Sargent informed Greenan that he was inexperienced in the options market and would rely on Greenan's expertise for options dealings. Greenan responded that he understood Sargent's cost averaging plan, would manage the Coleco options accordingly, and would trade the stock as directed by Sargent.

14. By mid-September 1983, Sargent had reduced the average cost of his Coleco stock to approximately the then prevailing market value. Sargent instructed Greenan to sell all his Coleco stock if the market price dropped as much as one-half point. Greenan said he understood, would watch the daily market and sell if there was any drop. In violation of his duty to claimants, Greenan failed to exercise due care or diligence in monitoring Sargent's account and failed to sell the Coleco stock as directed by Sargent even though the Coleco stock dropped about five points during the following week.

15. On October 18, 1983, in furtherance of his cost averaging plan (which had to be put into action again because of Greenan's failure to sell the claimants' stock and thus eliminate any loss to claimants as alleged in paragraph 17 above [*sic*]), Sargent, through Greenan, purchased 1,000 shares of Coleco stock for $28,184.71, including commission.

16. In October of 1983, in violation of his duty to claimants, Greenan negligently failed to advise Sargent that certain option contracts for Coleco stock would be exercised against Sargent on or about October 20, 1984. As a result, Sargent was unable to anticipate and avoid this contingency and was forced to purchase 400 shares of Coleco stock at ap-

proximately $16.00 a share above the prevailing market price, for a total of $18,296.50 including commission.

17. On November 25, 1983, in continued furtherance of his cost averaging plan (which had been put into action again because of Greenan's failure to sell the claimants' stock and thus eliminate any loss to the claimants as alleged in paragraphs 17 and above [*sic*]), Sargent directed Edgington to purchase 3,000 shares of Coleco stock at the current market price of $18.75 a share for a total of $56,250, excluding commission. Edgington, who was acting for the vacationing Greenan, refused without just cause or reason in violation of the respondents' duty as claimants' agent to execute the purchase order on Sargent's behalf although Sargent had the money in his account for the transaction. As a direct result of Edgington's refusal to act, Sargent's cost averaging plan was thwarted because he was unable to reduce his average cost basis when the market price of Coleco stock was low. He was then unable to take advantage of the subsequent rise in the price of Coleco stock before Christmas 1983 to sell his Coleco stock with little or no loss, because he had not been allowed to adequately reduce his average cost basis.

18. On November 28, 1983, Jordan Ball assigned Doyle to replace Greenan as Sargent's individual account executive. On December 14, 1983, Doyle failed to exercise her duty of reasonable care and judgment and (contrary to Sargent's investment objectives because the market price had risen) purchased an additional 2,500 shares of Coleco at $25.00 a share for a total of $62,990.26 including commission.

19. In violation of its duty to claimants, Paine Webber acting through Ball, failed and neglected to exercise proper supervision and control over subordinate account executives by allowing them to neglect their duties to claimants.

20. In January of 1984, Sargent instructed Doyle to sell the Coleco options as soon as possible. Doyle negligently failed to sell those options in a prompt and efficient manner, despite the fact that the market price continued to drop.

21. As a direct result of the aforesaid actions, the claimants lost at least $300,000, in Coleco stocks and put and call options thereon, calculated as the difference between the sum advanced by claimants for the purchase of said securities and the sum received by them upon the final sale of said securities, including brokerage commissions, plus interest. The exact amount of claimants loss has not as yet been definitely ascertained.

22. The negligence of respondents was gross and wanton and claimants should recover therefore punitive damages in the sum of $500,000 in addition to their compensatory damages in this action.

WHEREFORE, the premises considered, claimants demand:

1. That an award be rendered in favor of claimants against all respondents, jointly and severally, in the amount of Three Hundred Thousand Dollars ($300,000) as compensatory damages or such larger amount as shall be proved;

2. That an award be rendered in favor of claimants against all respondents, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000) as punitive damages;

3. That claimants be awarded their arbitration costs, expenses and attorneys fees; and

4. That the costs of the arbitration be borne by respondents, jointly and severally.

5. For such other and further relief as this arbitration committee deems just and proper.

Respectfully submitted,

REUSS HERNDON McCONVILLE & KING

By: _____

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NEW YORK STOCK EXCHANGE RULES

Rule 607. Designation of Number of Arbitrators

(a)(1) Except as otherwise provided in this Code in all arbitration matters involving public customers and other non-members where the matter in controversy does not exceed the amount of $500,000, or where the matter in controversy does not involve or disclose a money claim, the Arbitration Director shall appoint an arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers and other non-members where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

Rule 622. Interpretation of Code

The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

Rule 624. Record of Proceedings

Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration shall be kept. If a

record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.